

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

CAPITOL RECORDS, INC., a Delaware corporation, <i>et al.</i> ,)
) Case No. 06-1497 (MJD/RLE)
)
Plaintiffs,) PLAINTIFFS' MOTION TO CERTIFY
) SEPTEMBER 24 ORDER FOR
v.) INTERLOCUTORY APPEAL AND FOR
) STAY OF PROCEEDINGS PENDING
JAMMIE THOMAS,) APPEAL
)
Defendant.)
)

Pursuant to 28 U.S.C. § 1292(b), Plaintiffs respectfully request that the Court certify its September 24, 2008 Order as appropriate for interlocutory appeal. In its September 24, 2008 Order (Docket No. 197), the Court reversed itself and concluded (1) that the Copyright Act did not provide for liability under 17 U.S.C. § 106(3) for making a copyrighted sound recording available to other users of a peer-to-peer network; (2) that Jury Instruction No. 15, which had endorsed a contradictory rule, was manifestly erroneous; and (3) that a new trial was necessary. The Eighth Circuit should review the September 24 Order before this Court conducts a new trial. The question of the appropriate jury instruction is a purely legal question. And as the parties' briefing, the Court's *sua sponte* reconsideration, and the many courts to have recognized the making-available right suggest, there is substantial ground for difference of opinion. Inasmuch as a trial has already been conducted under one of the two legal standards that would emerge from an appeal, the Eighth Circuit's ruling may obviate the need for a second trial.

Accordingly, for the reasons set out in Plaintiffs' Memorandum in Support being filed contemporaneously, this case should be certified for interlocutory review, and proceedings in this Court should be stayed while the issue is resolved.

Respectfully submitted this 14th day of October 2008.

/s/ Timothy M. Reynolds

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CERTIFICATE OF CONFERENCE

This certifies that counsel for Plaintiffs contacted Defendant, through counsel, on October 14, 2008, regarding the relief requested in this motion, and Defendant's counsel stated that Defendant is opposed.

/s/ Timothy M. Reynolds
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